Kentucky Law Journal

Volume 32 | Issue 3 Article 3

1944

Perjured Testimony as a Ground for *coram nobis* in Kentucky

Leo E. Oxley
University of Kentucky

NOTE

PERJURED TESTIMONY AS A GROUND FOR CORAM NOBIS IN KENTUCKY

In *Anderson v. Buchanan,* 292 Ky 810, 168 S.W (2d) 48 (1943), perjured testimony was made a ground for the writ of error *coram nobis* in Kentucky Defendant, Anderson, was convicted of murder in the course of armed robbery and was sentenced to be executed. Shortly before his execution, he applied for the writ of *coram nobis* in the Fayette Circuit Court, and upon its being denied there, applied to the Court of Appeals for issuance of the writ, on the ground that the testimony of his confederate in crime was perjured and that his conviction resulted from this false testimony The appellant filed sworn statements made by the alleged perjurer, wherein the latter repudiated his testimony given at the trial, insofar as it applied to appellant, and declared that appellant was in no way connected with the crime; that his actual partner was a man who had since died. *Held,* the writ would lie. By this decision the court reversed *Jones* v. *Commonwealth*[1] and *Robertson v. Commonwealth,*[2] both of which held that the writ would not lie on the ground of newly discovered evidence generally or perjured testimony as a particular form thereof. The instant decision represents an extension of the grounds of availability of the writ which is *contra* to the prevailing rule.

Coram nobis is an ancient common law writ used more frequently in early days in civil cases but recently more often employed in criminal proceedings. It is generally held to be available in all jurisdictions where the common law is applicable, unless it has been expressly forbidden by statute or is forbidden by implication because there is a statutory equivalent.[3] Its function is to bring to the attention of the trial court an error of fact, which does not appear on the record, and which, being unknown to the court at the trial and beyond the reach of the defendant by the exercise of due diligence, was an essential factor in the judgment reached.[4] It lies in an appellate court after affirmance of the original judgment as well as in the trial court, though application for the writ should first be made to the trial court, and, if possible, to the trial judge.[5] It has been held to be an available remedy where the accused pleaded guilty of murder on the advice of counsel, such plea being induced by the threat

---

[1] 269 Ky 779, 108 S.W (2d) 816 (1937) See Note (1942) 31 Ky L. J. 86.
279 Ky 762, 132 S.W (2d) 69 (1939)

[3] Freedman, *The Writ of Error Coram Nobis* (1929) 3 Temp. L.Q. 365, 372.

[4] 31 Am. Jur., Judgments, sec. 802; 24 C.J.S., Criminal Law, sec. 1606.

[5] Buckler v State, 173 Miss. 350, 161 So. 683 (1935)

of mob violence;[6] likewise, where the defendant was insane at the time of trial;[7] where the defendant, who was a minor, at the time of the trial appeared by attorney rather than by guardian;[8] where the accused was a slave;[9] also, where a clerical error was made in the record.[10] A majority of the cases expressly hold that the writ does not lie for newly discovered evidence[11] or perjured testimony.[12]

The writ has been held to be a part of Kentucky law and to be available wherever it would have been available at common law, unless supplanted by a statute.[13] It has been held to be available in a proper case though the conviction has been affirmed by the appellate court.[14]

In reaching its decision in the instant case, the court appears to have been much impressed by the fact that after denying *coram nobis* in *Jones v. Commonwealth*,[15] the defendant appealed to the federal courts and won his release on a writ of *habeas corpus*,[16] it appearing in that case that the Commonwealth's attorney entertained grave doubts as to the guilt of the accused and the justice of the verdict. The accused was not brought to trial again. Under the state of the law it appeared that after affirmance of his conviction and expiration of the time for the granting of a new trial, a defendant could obtain no relief in the courts and could only rely upon the mercy of the executive, though it clearly could be demonstrated that the conviction was unjust. The court calls such a situation abhorrent, apparently feeling that in such a situation the defendant should be afforded relief in the same courts wherein occurred the original miscarriage of justice instead of being compelled to resort to federal courts.

The reason given generally for refusing to allow the writ on the ground of newly discovered evidence or perjured testimony is that to hold otherwise would render judgments too insecure to comport with sound public policy.[17] In most jurisdictions the writ has no time limitation[18] and hence, it is said, many years after conviction, the party could fabricate evidence, contending that it was unavailable

[6] Sanders v State, 85 Ind. 318, 44 Am. Rep. 29 (1882)
[7] People v Smith, 296 Ill. 636, 15 N.E. (2d) 604 (1938), Swan v. State, 215 Ind. 259, 18 N.E. (2d) 921 (1939)
[8] Meredith v. Sanders, 5 Ky. 101 (1810)
[9] Ex parte Toney, 11 Mo. 661 (1849)
[10] 31 Am. Jur., Judgments, sec. 802.
[11] 24 C.J.S., Criminal Law, sec. 1606 at p. 149 and the many cases there cited.
[12] People v Mooney, 178 Cal. 525, 174 Pac. 325 (1918) Jones v State, 130 Fla. 645, 178 So. 404 (1938) People v Drysch, 311 Ill. 342, 143 N.E. 100 (1924)
[13] Jones v Com., 269 Ky 779, 108 S.W (2d) 816 (1937)
[14] Smith v. Buchanan, 291 Ky 44, 163 S.W (2d) 5 (1942)
[15] Supra, note 1.
[16] 97 F (2d) 335 (1937)
[17] Bigham v Brewer, 4 Sneed (Tenn.) 432 (1856)
[18] 31 Am. Jur., Judgments, sec. 808.

at the time of the trial, and upon that ground secure a new trial. The prosecuting witnesses might be scattered and unavailable at that time, the result being that the party, though guilty might go free. No case could be considered as finally closed if the writ were to be allowed on these grounds, contend the proponents of the majority rule. The court is fully competent to protect itself from imposition. The fact that the writ was applied for many years after the conviction, or that the evidence or perjury relied on was uncovered as the shadow of the executioner approached would be circumstances which the court would weigh very carefully before allowing the writ.

In the instant case the Court took the view that the appellant's petition presented a state of facts, which, if true, disclosed the possibility of a grave miscarriage of justice, and that no other remedy being available in the state courts, the writ of *coram nobis* should lie as an emergency measure to prevent the execution of a possibly innocent man.

While conceding the necessity of making judgments of conviction for crime stable and final, yet this decision of the Court appeals strongly to reason and justice. Appellant was convicted on the strength of his confederate's testimony; without that testimony a conviction would have been, at least, uncertain. It is true that the allegedly false testimony stood for many months uncontradicted; nevertheless, the court had before it a sworn statement to the effect that the testimony which resulted in a death sentence for the appellant was perjured, and that the man upon whom a death sentence had been pronounced was innocent. It is difficult to perceive why these circumstances furnish grounds less valid for the issuance of the writ than those instances, previously enumerated, where it was allowed.

Though most authorities subscribe to the contrary view, the present decision is not without support. The Indiana Supreme Court has said, " If, however, the newly discovered evidence be of such a conclusive nature as to demonstrate it to be practically impossible, under all circumstances that the judgment was right upon the merits, then the writ of error *coram nobis* will lie."[19] It is said, "The writ does not ordinarily lie for alleged false testimony at the trial; but it has been said that the court has discretion to grant the writ where it appears that the verdict most probably would not have been rendered except for such testimony, and that there is a strong probability of a miscarriage of justice unless the writ is granted."[20] In *Davis v State*,[21] where the defendant was convicted on perjured testimony that was procured by the prosecuting official, the writ was allowed by the Supreme Court of Indiana.

[19] George v. State, 211 Ind. 429, 6 N.E. (2d) 336 (1937)

[20] 24 C.J.S., Criminal Law, sec. 1606. See Davis v State, 200 Ind. 88, 161 N.E. 375 (1928)

[21] 200 Ind. 88, 161 N.E. 375 (1928)

Despite the weight of *contra* authority it is submitted that the view expressed in the instant case is more consonant with reason and justice than the majority rule. Where the chief prosecuting witness repudiates his former testimony and absolves his alleged confederate in crime and names another as the party actually guilty, sufficient doubt is cast upon the correctness of the judgment to justify a re-examination of the evidence against the convicted party and a weighing of the repudiation. This limited extension of the grounds of availability of *coram nobis* should seem to be a useful device for enabling the courts to forestall gross miscarriages of justice in admittedly rare instances without impairing that desirable stability of judgments which comports with sound public policy

LEO E. OXLEY